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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

HERINEO SERRANO,

1:09-cv-00993-AWI-DLB (HC)

Petitioner,

v.

FINDINGS AND RECOMMENDATION
REGARDING RESPONDENT’S MOTION TO
DISMISS

PAT L. VASQUEZ, Warden

[Doc. 10]

Respondent.

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Petitioner filed the instant petition for writ of habeas corpus on June 8, 2009. (Court Doc. 1.) Respondent filed a motion to dismiss on July 22, 2009, and Petitioner filed an opposition on August 3, 2009. (Court Docs. 10, 11.)

DISCUSSION

A. Procedural Grounds for Motion to Dismiss

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court” Rule 4 of the Rules Governing § 2254 Cases.

The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an answer if the motion attacks the pleadings for failing to exhaust state remedies or being in violation of

1 the state's procedural rules. See e.g. O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990)
2 (using Rule 4 to evaluate motion to dismiss petition for failure to exhaust state remedies); White
3 v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural grounds to review
4 motion to dismiss for state procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12
5 (E.D. Cal. 1982) (same). Thus, a Respondent can file a motion to dismiss after the court orders a
6 response, and the Court should use Rule 4 standards to review the motion. See Hillery, 533 F.
7 Supp. at 1194 & n. 12.

8 In this case, Respondent's motion to dismiss is based on a violation of 28 U.S.C.
9 2244(b)(1). Because Respondent's motion to dismiss is similar in procedural standing to a
10 motion to dismiss for failure to exhaust state remedies or for state procedural default and
11 Respondent has not yet filed a formal answer, the Court will review Respondent's motion to
12 dismiss pursuant to its authority under Rule 4.

13 B. Successive Petition

14 _____ Because the current petition was filed after April 24, 1996, the provisions of the
15 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current
16 petition. Lindh v. Murphy, 521 U.S. 320, 327 (1997). A federal court must dismiss a second or
17 successive petition that raises the same grounds as a prior petition. 28 U.S.C. § 2244(b)(1). The
18 court must also dismiss a second or successive petition raising a new ground unless the petitioner
19 can show that 1) the claim rests on a new, retroactive, constitutional right or 2) the factual basis
20 of the claim was not previously discoverable through due diligence, and these new facts establish
21 by clear and convincing evidence that but for the constitutional error, no reasonable factfinder
22 would have found the applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B).
23 However, it is not the district court that decides whether a second or successive petition meets
24 these requirements, which allow a petitioner to file a second or successive petition.

25 Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted by
26 this section is filed in the district court, the applicant shall move in the appropriate court of
27 appeals for an order authorizing the district court to consider the application." In other words,
28 Petitioner must obtain leave from the Ninth Circuit before he can file a second or successive

1 petition in district court. See Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must
2 dismiss any second or successive petition unless the Court of Appeals has given Petitioner leave
3 to file the petition because a district court lacks subject-matter jurisdiction over a second or
4 successive petition. Pratt v. United States, 129 F.3d 54, 57 (1st Cir. 1997); Greenawalt v.
5 Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997), *cert. denied*, 117 S.Ct. 794 (1997); Nunez v.
6 United States, 96 F.3d 990, 991 (7th Cir. 1996).

7 A second or successive petition for habeas corpus is not considered “successive” if the
8 initial habeas petition was dismissed for a technical or procedural reason versus on the merits.
9 See Slack v. McDaniel, 529 U.S. 473, 485-87 (2000) (holding that a second habeas petition is not
10 successive if the initial habeas petition was dismissed for failure to exhaust); Stewart v.
11 Martinez-Villareal, 523 U.S. 637, 643-45 (1998) (a second habeas petition is not successive if the
12 claim raised in the first petition was dismissed by the district court as premature.)

13 Respondent argues that the instant case is a successive petition and should be dismissed
14 pursuant to 28 U.S.C. § 2244(b)(1). Specifically, Respondent contends that the instant petition
15 challenges the same Board of Parole Hearings’ 2008 decision as the petition previously filed in
16 this Court in case number 1:09-cv-00982-AWI-BAK (HC). The Court does not agree with
17 Respondent that the instant petition is successive of the prior petition filed in this Court in case
18 no 1:09-cv-00982-AWI-BAK (HC) because that petition is still pending and has not been
19 resolved on the merits. Moreover, as Petitioner makes clear in his opposition, the instant petition
20 is duplicative of the previously filed petition and was submitted by him as a copy of the prior
21 petition filed in case number 1:09-cv-00982-AWI-BAK (HC).¹ Accordingly, because the instant
22 petition is a copy of the petition and contains the exhibits referenced therein, the Court will
23 recommend that it be dismissed and filed as an Amended Petition in case number 1:09-cv-00982-
24 AWI-BAK (HC).

25 RECOMMENDATION

26 Based on the foregoing, it is HEREBY RECOMMENDED that:

27 _____
28 ¹ The petition filed in case number 1:09-cv-00982-AWI-BAK (HC) is identical to the petition filed in this case, but does not contain the referenced exhibits.

